U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Date Issued: June 12, 2003

BALCA Case No.: 2002-INA-150
ETA Case No.: P2001-NJ-02473159

In the Matter of:

HAROLD'S II KOSHER SUPERETTE,
Employer,

on behalf of

DAVID REYES,
Alien.

Appearance: Mark J. Sherwin, Esq.
Elmwood Park, New Jersey

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "meat cutter."[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On June 15, 1998, Harold's II Kosher Superette ("Employer") filed an application for labor certification to enable David Reyes ("Alien") to fill the position of "meat cutter." (AF 19). Two years of experience in the job offered was required.

The Certifying Officer ("CO") issued a Notice of Findings ("NOF") on December 13, 2001, proposing to deny certification. (AF 47). The reasons therefor were as follows: (1) Employer had failed to provide a copy of the posted notice and results thereof as required by 20 C.F.R. §656.20(g)(1) and (g)(3); (2) the salary stated in the advertisements placed in the newspaper was below that which Employer offered the Alien in violation of 20 C.F.R. §656.21(g), and Employer failed to advertise for three consecutive days as required; and (3) two applicants were considered qualified for the position and their rejection by Employer was based on other than lawful-job-related reasons. (AF 44-46). Employer stated that he left a message on one of the applicant's answering machine and the applicant failed to contact him, and the other applicant failed to appear for an interview or to call to re-schedule the interview. The CO found that Employer failed to provide telephone logs and evidence of contact by mail. To rebut, Employer was directed to provide telephone logs and evidence of contact by mail and further document specific lawful, job-related reasons for rejection of the two U.S. applicants. (AF 45). With regard to the first two issues listed in the NOF, Employer was directed to (1) post notice if the job offer was in accordance with the above cited regulations and requirements and submit a copy of the posting along with documentation of results; and (2)document its willingness to re-advertise in accordance with 20 C.F.R. §656.21(g). (AF 44-45).

Employer's counsel submitted a rebuttal letter on January 16, 2002, with (1) copies of the Notice of Posting which was placed in the place of employment from January 19, 2001 until February 9, 2001; (2) Tear sheets from the newspaper dated April 23, 24, and 29, 2001; and (3) a reply letter from Employer's president. (AF 51). In his letter, Employer's president stated that he had posted a new Notice of Posting and was willing to re-advertise in accordance with the cited regulations. (AF

48). Employer's president further stated that the telephone logs concerning his attempts to contact the applicants were not available to him. (AF 48).

A Final Determination was issued on February 6, 2002, in which certification was denied. (AF 54). The CO found that Employer had failed to adequately document that the two U.S. applicants were rejected solely for lawful job-related reasons. (AF 52-53). The CO also found that Employer failed to clarify why the advertisement it ran listed a lower wage than that offered to Alien or why the advertisement did not appear for three consecutive days as required. Since Employer failed to adequately document lawful job-related reasons for rejection of these U.S. applicants, re-advertising was not an option. (AF 52).

On March 11, 2002, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 71).

DISCUSSION

With its Request for Review of Denial of Certification, Employer appends a telephone log, claiming that "at this time we were able to locate the telephone log." Employer has also included a letter from Verizon, and a letter from the Employer setting forth an explanation as to why the advertisements were improperly placed. In effect, Employer is now belatedly attempting to submit the documentation requested by the CO in her NOF. This Board will not consider the material submitted with the request for review, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. 656.27(c); s*ee also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant,* 1990-INA-480 (Jan. 7, 1992).

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.,* 1987-

INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, Employer was requested to provide documentation of its attempts to contact two U.S. applicants who met the qualifications for the position. An employer must provide directly relevant and reasonable documentation sought by the CO. *Gencorp,* 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to do so warrants denial of labor certification. *Rouber International,* 1991-INA-44 (March 31, 1994). Employer failed to produce the requested information with regard to its contact of the U.S. applicants. Based upon Employer's failure to provide documentation reasonably requested by the CO, we find that certification was properly denied, and it is unnecessary to address the remaining issues.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.